

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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MAR 11 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Revision of Part 22 and)
Part 90 of Commission's Rules)
to Facilitate Future)
Development of Paging Systems)
)
Implementation of)
Section 309(j) of the)
Communications Act --)
Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

DOCKET FILE COPY ORIGINAL

**JOINT REPLY COMMENTS ON THE INTERIM
LICENSING PROPOSAL**

AACS Communications, Inc.
AirTouch Paging
Answer, Inc.
Arch Communications Group, Inc.
Cal-Autofone
Centrapage of Vermont
Centracom, Inc.
Communications Enterprises
Desert Mobilfone
Detroit Newspaper Agency
Electronic Engineering Company
Hello Pager Company, Inc.
Jackson Mobilphone Company
LaVergne's Telephone Answering Service
Midco Communications
Donald G. Pollard d/b/a Siskiyou Mobilfone
PowerPage, Inc.
Radio Electronic Products Corp.
RETCOM, Inc.
Westlink Licensee Corporation

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SUMMARY

A broad-based coalition of over 20 paging companies (the "Joint Commenters") filed a consolidated set of comments in this proceeding, and now is submitting a Joint Reply.

The record of the proceeding, viewed as a whole, provides overwhelming support for several key proposals made by the Joint Commenters. For example, a large number of commenters agrees that the freeze should be lifted on Part 22 paging applications in order to permit uncontested non-mutually exclusive applications to continue to be filed and processed.

The comments also suggest a variety of alternative means to provide needed relief from the freeze to 929 MHz operators. In reply, the Joint Commenters indicate that several of the offered suggestions (e.g., a 40-mile rule exception; a 50% overlap exception or using an interim MX procedure) would be acceptable.

Several commenters argue that according expansion sites co-primary status, rather than secondary status, is justified. While the Joint Commenters continue to believe that some expansions should be licensed permanently, there are multiple

public interest reasons that co-primary licenses are preferable to secondary licenses.

The Joint Commenters also support those who request clarifications that: (a) the fixed mileage interference contours defined in the current rules have not been abandoned in favor the proposed interference formula; (b) control station applications can continue to be filed; (c) the freeze does not apply to requests for Special Temporary Authority; and (d) certain filings made above Line A should be allowed.

The Joint Commenters disagree, however, with those who advocate the adoption of an interim oral outcry auction procedure to resolve currently MXed applications. Such a two-step process could delay and complicate the final resolution of this proceeding.

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(including its affiliates and subsidiaries),^{1/} Answer,
Inc., Arch Communications Group, Inc. (and its
subsidiaries),^{2/} Cal-Autofone, Centrapage of Vermont,
Centracom, Inc., Communications Enterprises, Desert

1/ The licensee affiliates of AirTouch Paging are:
AirTouch Paging of Virginia, Inc., AirTouch
Paging of Kentucky, Inc., AirTouch Paging of
Texas, AirTouch Paging of California and
AirTouch Paging of Ohio.

2/ Licensee subsidiaries of Arch Communications
Group include: Arch Capitol District, Inc., Arch
Connecticut Valley, Inc., Hudson Valley Mobile
Telephone, Inc., Arch Michigan, Inc., Arch
Southeast Communications, Inc., Becker Beeper,
Inc., The Beeper Company of America, Inc., BTP
Acquisition Corporation, Groome Enterprises,
Propage Acquisition Corporation, USA Mobile
Communications, Inc. II, Q Media Company -
Paging, Inc., Q Media Paging - Alabama, Inc.,
Premiere Page of Kansas, Inc. and Professional
Communications, Inc.

Mobilfone, the Detroit Newspaper Agency, Electronic Engineering Company, Hello Pager Company, Inc., Jackson Mobilphone Company, LaVergne's Telephone Answering Service, Midco Communications, Donald G. Pollard d/b/a Siskiyou Mobilfone, PowerPage, Inc., Radio Electronic Products Corp., RETCOM, Inc. and Westlink Licensee Corporation (collectively, the "Joint Commenters"), do hereby file their Joint Reply Comments on the interim licensing proposal set forth in the Notice of Proposed Rulemaking, FCC 96-52, released February 9, 1996 (the "Notice") in the above-captioned proceeding. In reply, the following is respectfully shown:

I. Overview

1. In comments filed on March 1, 1996 in this proceeding,^{3/} the Joint Commenters asked the Commission to relax the paging application filing freeze. In doing so, they asserted that the diversity of their commenting group^{4/} indicated an emerging industry consensus. Now, virtually the entire paging industry has weighed in with approximately 60 sets of

^{3/} See Joint Comments of AACS et al. filed March 1, 1996 (the "Joint Comments").

^{4/} The Joint Commenters reflect a broad cross-section of paging companies: big and small, new and old, publicly-held and privately-held, operating in all paging bands.

comments on behalf of nearly 100 paging companies,^{5/} three law firms,^{6/} an equipment manufacturer,^{7/} a radio engineer,^{8/} and the Personal Communications Industry Association which represents the industry at large.

2. With only one possible exception,^{9/} the commenters oppose the continuation of the freeze in its current form.^{10/} In doing so, many echo the concerns earlier expressed by the Joint Commenters. Specifically, they highlight in great detail the substantial public interest harm that results from the inability of existing carriers to process modification applications that would extend their interference

5/ Nearly 100 individual paging companies are identified as commenting parties either by virtue of separate comments, joint comments or as members of coalitions.

6/ Comments were filed by the firms of Brown and Schwaninger, Hill & Welch and the Law Firm of John D. Pellegrin.

7/ See Comments of Glenayre Technologies, Inc.

8/ See Comments of Raymond E. Trott, P.E.

9/ TSR Paging generally acknowledges the need for a freeze when license processes are changing, but agrees that the freeze will cause substantial harm if it lasts more than a few months.

10/ Although many comments were directed to particular bands in which the commenter had an interest, the comments as a whole oppose the freeze as it relates to all bands.

contours.^{11/} The interested parties repeatedly reference the facts that paging systems are constantly evolving to satisfy changing public needs,^{12/} and that the inability to meet these needs will have a devastating impact on consumers.^{13/}

3. Additionally, some commenters point out noteworthy public interest considerations not mentioned by the Joint Commenters in their filing. For example, several note the adverse effect of the freeze on employment.^{14/} Paging companies will be forced to let sales people go if expansion systems cannot be brought

^{11/} See, e.g., Comments of: American Paging, p. 3; Ameritech Mobile Services, p. 2; Consolidated Communications Mobile Services, p. 2; Frontier Corporation, p. 3; Metrocall, p. 8; MobileMedia Communications, p. 7; Morris Communications, p. 5; Ameritel Paging, et al., pp. 3-4; PCIA, pp. 2, 5; Pioneer Telephone Cooperative, p. 10.

^{12/} Needs exist both to expand geographically to serve areas adjacent to existing systems, and to build systems to alleviate delays on existing systems.

^{13/} See, e.g., Comments of A+ Networks, p. 2; Nationwide Paging et al., p. 2; Personal Communications, pp. 1-2; PCIA, p. 9; TeleTouch Licenses, p. 5; Western Radio, p. 2.

^{14/} See, e.g., Comments of: Brandon Communications, pp. 3-4; Glenayre, p. 4; Merryville Investments, p. 2; Metrocall, p. 8; Morris Communications, p. 4; Nationwide Paging, p. 4; Pager One, p. 11.

on line.^{15/} Manufacturers will be forced to stop producing equipment as orders are cancelled or slow to a halt.^{16/} In many recent instances, the Commission has noted the beneficial effects of its decisions on the economy and employment.^{17/} Since these are worthy public interest concerns, the Commission should be attentive when presented with a record demonstrating economic and employment harm arising out of a Commission action.

II. Many of the Joint Commenters' Proposals Are Endorsed by Others

4. In their original filing, the Joint Commenters advocated that the freeze be lifted on all Part 22 frequencies and that any uncontested, non-mutually exclusive applications be processed and

^{15/} This will be especially true if companies are unable to build new systems to satisfy the growing demand for service.

^{16/} Indeed, some companies, such as Glenayre have already had a decline of their stock price which appears to be directly related to their assessment of the freeze on their future business prospects.

^{17/} See, e.g., CC Docket No. 95-185, Interconnection Between Local Exchange Carrier and Commercial Mobile Service Provident, Notice of Proposed Rule Making, FCC 95-505, released January 11, 1996; GEN Docket No. 90-314, Amendment of the Commission's Rules to Establish New Personal Communications Service, Memorandum Opinion and Order, 9 FCC Rcd. 4957 (1994), para. 10.

granted.^{18/} This proposal enjoyed overwhelming support from other commenters.^{19/} These commenters properly recognize that the Commission can use the existing mutually-exclusive application rules to ensure that white space of interest to multiple parties is not licensed except as part of a market area license. However, if no competing proposals are filed, the marketplace will have spoken that the white space is not in demand by others. In that case, the Commission should process the applications as there would be no harm to the public interest. Indeed, the Commission would be required to license these facilities because

^{18/} Joint Comments, Section IV.A. This procedure would address the concerns of applicants who have pending applications which became frozen because the MX application period had not run by February 8, 1996. The Joint Commenters strongly agree that it is inappropriate to defer processing of non MXed applications that were filed prior to the freeze, and a mechanism must be found to allow the processing of these applications to continue.

^{19/} See, e.g., Comments of: ATS Mobile Telephone, p. 5; Baker's Electronics and Communications, p. 5; Baldwin Telecom and Emery Telephone Company, p. 5; Brandon Communications, p. 7; Chequamegon Telephone Cooperative, p. 5; Communications Sales and Service and Beeper One, p. 5; HEI Communications, p. 5; B&B Beepers, p. 5; Mashell Connect, p. 3; Merryville Investments, p. 8; Metamora Telephone Company, p. 5; Metrocall, Inc., pp. 11-12; MobilMedia Communications, p. 16; Mobilfone Service, p. 5; Pager One, p. 7; Porter Communications, p. 5; Rinkers Communications, p. 5; Supercom, p. 5; Wilkinson County Telephone Co., p. 5.

auction authority only extends to mutually exclusive applications.

5. In view of the overwhelming support for lifting the freeze on Part 22 applications, the Joint Commenters urge the Commission to adopt this approach. If for any reason the Commission is unwilling to do so, the Joint Commenters reiterate the proposal set forth at Section IV.C of their Joint Comments. Specifically, the proposal was for the Commission to lift the freeze on any frequency within an MTA where a carrier can certify that 66 2/3 or more of the population is encompassed by the composite service area contour of existing facilities on that frequency. This exception could be further refined to enable competing applications to be filed once a certifying carrier submitted an expansion proposal.

6. The Joint Commenters also concluded in their original filing that secondary licensing does not provide an adequate answer to the need to modify existing facilities.^{20/} This same conclusion was reached by a large number of the other commenters.^{21/}

^{20/} Joint Comments at Section IV.E. As is discussed within, co-primary licensing is a better solution than secondary licensing.

^{21/} See, e.g., Comments of: American Paging, p. 3; Ameritech Mobile Services, pp. 7-9; Brandon
(continued...)

Generally, these parties echo the Joint Commenters' concerns that according a site secondary status presents too great a risk to the paging carrier who may lose its investment, and to the consumer who may suffer from a discontinuance of previously established service.^{22/}

7. The Joint Commenters recommended as well that relief from the freeze be extended to the private carrier paging frequencies.^{23/} Specifically, the Joint Commenters proposed that the Commission use a 40-mile rule for 929 MHz PCP channels to identify new sites that would be deemed sufficiently proximate to an operating station location to be filed and processed. Many commenters also recommended the use of a 40-mile rule to identify permissive applications.^{24/} The 40-

^{21/} (...continued)

Communications, p. 5; Consolidated Communications Mobile Services, p. 4; Merryville Investments, p. 6; Metrocall, p. 9; MobileMedia Communications, p. 11; Ameritel et al., p. ii; PCIA, p. 40; Source One, p. 3; TeleTouch, p. 11.

^{22/} Unlike other services, such as 800 MHz and 900 MHz SMR, paging does not have roaming arrangements that would permit such service to continue if the site is lost.

^{23/} See Joint Comments, Section IV.B.

^{24/} See, e.g., Comments of: Paging Network, pp. 5-9; Ameritel et al., p. ii; Page Hawaii et al., p. 10; PCIA, p. 32; Pronet, p. 8; TeleTouch Licenses, p. 13.

mile proposal emerged because it has a corollary in the existing rules.^{25/} Indeed, the 40-mile rule appears quite modest in light of the number of parties who have advocated a total lifting of the freeze.^{26/}

III. Several Points Made by Other Commenters Are Worthy of Serious Commission Consideration

8. The Joint Commenters have conducted a careful review of the entire record of the proceeding, and in the process have come across several alternative proposals and specific concerns worthy of the Commission's attention. While the comments have not caused the Joint Commenters to abandon any of their original positions, in some instances alternatives proposed by others would be palatable to the Joint Commenters if they are found to be acceptable to the Commission.

^{25/} See 47 C.F.R. §22.539(b).

^{26/} Some conclude that it is inappropriate for the Commission to reserve 929 frequencies for auction when in fact they are not and cannot be mutually exclusive under the current first-come, first-serve application processing rules. See, e.g., Emergency Petition for Immediate Withdrawal of Freeze, filed February 28, 1996 by the Coalition for a Competitive Paging Industry. These and other parties argue, inter alia, that the statutory auction authority does not extend to such applications at this time, and that freezing these applications constitutes unlawful retroactive rulemaking.

9. For example, several parties suggest that the Commission adopt an interim procedure by which public notice is given of 929 MHz applications that are accepted for filing, and that these applications then be subjected to competing proposals just as they would be under Part 22 of the Commission's Rules.^{27/} Since the Commission is in fact moving to conform 931 MHz and 929 MHz licensing, adopting an interim procedure that treats them the same for expansion purposes makes some sense.^{28/}

10. Others propose that the Commission adopt a 50% overlap standard which would allow expansion applications to be filed provided there is an overlap of 50% or more of the new service area contour with the existing service area contour on the same frequency.^{29/} The 50% overlap rule has an historical

^{27/} See, e.g., Comments of Merryville Investments, pp. 8-9; Metrocall, p. 12; Morris Communications, p. 13; Nationwide Paging et al., p. 4; Pager One, p. 8.

^{28/} The Joint Commenters, however, do have some concern that adopting these interim procedures might delay the forthcoming market area auctions. If the Commission decides to move forward on this proposal, the Joint Commenters suggest the Commission adopt the interim rules immediately.

^{29/} See, e.g., Comments of: Brown and Schwaninger, p. 3; PageTel, pp. 4-5; Page Telecommunications et al., pp. 4-5; Pioneer Telephone Cooperative, p. 16; Western Radio, pp. 5-6.

antecedent in paging licensing,^{30/} which makes it a suitable choice for an interim standard.^{31/} Still others propose that any overlap of service contours should be deemed sufficient to permit a facility to be processed, or that any site within an existing interference contour be allowed.^{32/} Any of these proposed relaxations of the current freeze would be welcomed by the Joint Commenters.

11. A few commenters argue that expansion sites filed by an incumbent on a previously-licensed frequency that are licensed after the Notice should be considered co-primary with, rather than secondary to, those of a subsequent market area licensee.^{33/} The Joint Commenters think this is a worthy proposal for several reasons. First, co-primary licensing solves the problem identified by many that a defeasible secondary license will completely discourage investments. Second, there is a strong tradition of

^{30/} 47 C.F.R. §22.16(b)(2) (1994).

^{31/} Indeed, prior to the Part 22 Rewrite, these facilities were considered fill-in transmitters and were licensed on a more streamlined basis than applications to serve new markets.

^{32/} See, e.g., Comments of Paging Partners, p. 3.

^{33/} See, e.g., Comments of: Ameritech Mobile, p. 9; Pacific Bell, p. 3; Paging Partners, p. 3; Source One Wireless, p. 3.

cooperative channel usage in the paging business which makes co-primary licensing feasible. Third, co-primary status would prevent customers from suffering a loss of established services. Before the Commission resorts to secondary licensing as to accord relief from the freeze, the Joint Commenters urge the Commission to give serious consideration to co-primary status. Nevertheless, the Joint Commenters continue to believe that many expansions should be permanently licensed as proposed in their original comments.

12. Several requests for clarification of the freeze Order also should be honored by the Commission. For example, Hill & Welch make compelling arguments that the freeze should not apply to control stations, nor to frequencies above line A that are processed only with the concurrence of Canada.^{34/} The Joint Commenters urge the Commission to make these clarifications. Also, the Commission should confirm that the freeze does not apply to requests for Special Temporary Authority (STA).

^{34/} Hill & Welch Comments, pp. 2-3. Indeed, a facility whose interference contour is completely above Line A (or below Line C) cannot affect any other licensee and would not be available to a market area licensee unless the market area licensee had a similar arrangement with the foreign licensee.

13. Clarification also is needed regarding the interference formula for 929/931 MHz facilities. Several commenters recite an understanding of the implications of the new formula that is at variance from the understanding of the Joint Commenters.^{35/} Specifically, the Joint Commenters do not consider the Notice to require a retroactive recalculation of interference contours as they are defined in the current rules.^{36/} The Joint Commenters strenuously would oppose any such use of the new formula as currently constituted. In their view, the formula does not result in calculated contours that conform to actual operating conditions.^{37/} Indeed, several of the Joint Commenters have concluded that the retroactive use of the formula would create non-contiguous service areas in markets where the carriers

^{35/} See, e.g., Comments of: A+ Network, p. 3; American Paging, p. 3; Ameritel et al., p. 13; Paging Partners, p. 4; PCIA, p. 27; Pronet, p. 17.

^{36/} As indicated in the Joint Comments, counsel to the Joint Commenters has been advised by the Wireless Telecommunications Bureau that the relevant contour for expansion purposes is the fixed radius interference contour specified at 47 C.F.R. §22.537 at Table E-2. See Joint Comments, note 22.

^{37/} For example, there are many instances where facilities have larger service and interference contours than would result from the formula.

are in fact enjoying efficient and reliable coverage in the real world with their existing systems.

14. The Joint Commenters also agree with those who argue that the existing fixed mileage contours have served the industry well, and that changing them would result in an overwhelming burden of paperwork.^{38/} The burden would be particularly acute in the case of the 900 MHz frequencies. As some have properly noted,^{39/} filings of record with the FCC for PCP frequencies do not contain the basic engineering information that would be required for a co-channel operator to identify the calculated contour of another applicant. 931 MHz applications also do not contain the information necessary to determine calculated contours. In essence, using the formula in these instances would require a complete reengineering of virtually every private carrier paging and 931 MHz facility in the nation. Such an undertaking is completely at odds with the oft-stated Commission objective of reducing

^{38/} See, e.g., Ameritech Mobile, p. 10; Page Telecommunications, p. 4; Paging Network, p. ii; Source One, pp. 4-5.

^{39/} See, e.g., Comments of Paging Network, p. 12.

unnecessary licensing burdens and streamlining application processing procedures.^{40/}

15. The Joint Commenters also agree with those who contend that a retroactive redefinition of applicable service and interference contours would constitute an unlawful modification of their licenses without hearing in violation of Section 316 of the Communications Act of 1934, as amended.^{41/} In this regard, the Joint Commenters note that the results of using the formula in this case would be dramatically different than the results that occurred when the Commission modified the basis for calculating cellular service area contours.^{42/} In that instance, cellular carriers actually received increased service area contours; here, paging licensees would end up with decreased contours.

^{40/} See, e.g., PP Docket No. 96-17, Improving Commission Processes, Notice of Inquiry, FCC 96-50, released February 17, 1996.

^{41/} See, e.g., Comments of Ameritech Mobile, pp. 14-15; Coalition for a Competitive Paging Industry at pp. 23-25; Merryville Investments, pp. 11-13; Metrocall, pp. 14-16; Morris Communications, pp. 15-17; Nationwide Paging, pp. 13-16; Ameritel et al., p. 22.

^{42/} CC Docket No. 90-6, Amendment of Part 22 to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, Second Report and Order, 7 FCC Rcd. 2449 (1992) (modifying 47 C.F.R. §22.903).

IV. Interim Auction Rules Governing Current MXs Should Not Be Adopted

16. A few commenters request that the Commission immediately adopt interim rules to use oral outcry auctions to resolve currently MXed applications.^{43/} While the Joint Commenters understand and sympathize with the objective sought by these parties, there are practical problems with the proposal which argue against it.

17. First and foremost, the Joint Commenters are concerned that adopting a two-step process -- in which existing mutual exclusivities are resolved in a first auction process before market area auctions can commence -- will prove to be too time-consuming. Given the current situation, the need to get permanent rules in place quickly is paramount,^{44/} and should not be subrogated while the Commission is considering and implementing temporary auction rules. Second, an inadequate record has been compiled for the Commission to adopt well-considered interim auction rules at this time. The Joint Commenters are concerned that legal challenges could result were the Commission to impose

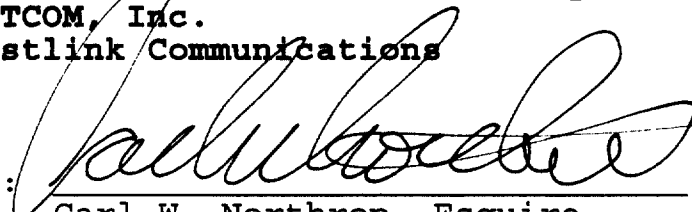
^{43/} See, e.g., Comments of Metrocall, p. 11; Morris Communications, p. 14; Nationwide Paging, pp. 12-13.

^{44/} See Joint Comments, Sections II, VI.

Respectfully submitted,

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Certificate of Service

I, Yvette Omar, a secretary with the law firm of Paul, Hastings, Janofsky & Walker, hereby certify that a copy of the foregoing **Joint Reply Comments on the Interim Licensing Proposal** was sent via first class U.S. mail, postage prepaid, or hand-delivered on March 11, 1996, to the following:

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